Ethics for Government Environmental Attorneys

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Based on presentations by
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The issue

Keeping Client Confidences
vs
Self-Reporting

Or

What can I do to keep that ECAMP report from being released?

The “ground rules”

Rules of Professional Conduct

Reporting Requirements

The “ground rules”

Rules of Professional Conduct

Reporting Requirements

Rules of Professional Conduct

1.2 Scope of Representation

1.6 Confidentiality of Information

3.3 Disclosures to a tribunal

3.9 Disclosures to admin. agency

4.1 Disclosures to prevent criminal act

1.13 Organization as a Client

2.1 Attorney's role as Advisor

available on-line at:

http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/modelrules/

Rules of Professional Conduct

1.2 Scope of Representation

- **A lawyer shall abide by a client's decisions concerning the objectives of representation**
- **A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows in criminal or fraudulent**

Rules of Professional Conduct

1.6 Confidentiality of Information
3.3 Disclosures to a tribunal
3.9 Disclosures to admin. agency
4.1 Truthfulness of disclosures

- **Do not reveal confidential information, except to prevent criminal act**
- **Do not knowingly misstate facts or law to a tribunal, or offer evidence that you know to be false. You may refuse to offer evidence that you reasonably believe to be false.**

Rules of Professional Conduct

1.13 Organization as a Client

- **A lawyer employed by an organization represents the organization**
- **If an officer or an employee is about to violate the law, the lawyer should:**
  - **Ask the officer or employee to reconsider action**
  - **Advise that a second legal opinion be sought**
  - **Refer matter to higher authority in the organization**

Rules of Professional Conduct

2.1 Attorney's role as Advisor

- **Exercise independent professional judgment**
- **Advice may include legal, moral, economic, social, and political considerations**

The “ground rules”

Rules of Professional Conduct

Reporting Requirements

5th Amendment:

No person . . . Shall be compelled in any criminal case to be a witness against himself.

Reality:

- **If the self-reporting scheme is aimed at enforcing criminal law, you don't have to report your conduct.**
- **If the self-reporting scheme is aimed at enforcing a regulatory scheme, and the reporting requirement seeks primarily to enforce the regulation, you must report.**

Kansas v. Greenberg, 607 P.2d 530 (1980)

Interaction between the Rules of Professional Conduct and Reporting Requirements

If the client has a legal obligation to report, the lawyer’s role is to counsel him to report.

Reporting Requirements

- **Releases of hazardous materials**
  - CERCLA, RCRA, CWA, HMTA, EPCRKA, etc.
  - 1-800-424-8802
  - Oil spills, chemical releases, transportation accidents, releases from RCRA TSDs

for detailed information, see the AFLSA page at
http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENVLAW/releasepage.htm

Reporting Requirements

- **Releases in excess of permitted limits**
  - Clean Water Act
  - Clean Air Act
- **Violations of administrative requirements**
  - CWA, CAA, RCRA, etc.

Reporting Requirements

- **But not every violation is reportable:**
  - **Results of a self-assessment (i.e, ECAMP)**
  - **Facility deficiencies**
  - **Uncharacterized waste streams**
  - **HW storage more than 90 days in unpermitted facility**
  - **Response / contingency plan out of date**
  - **Administrative / Recordkeeping problems**
  - **Training deficiencies**

Reporting Requirements

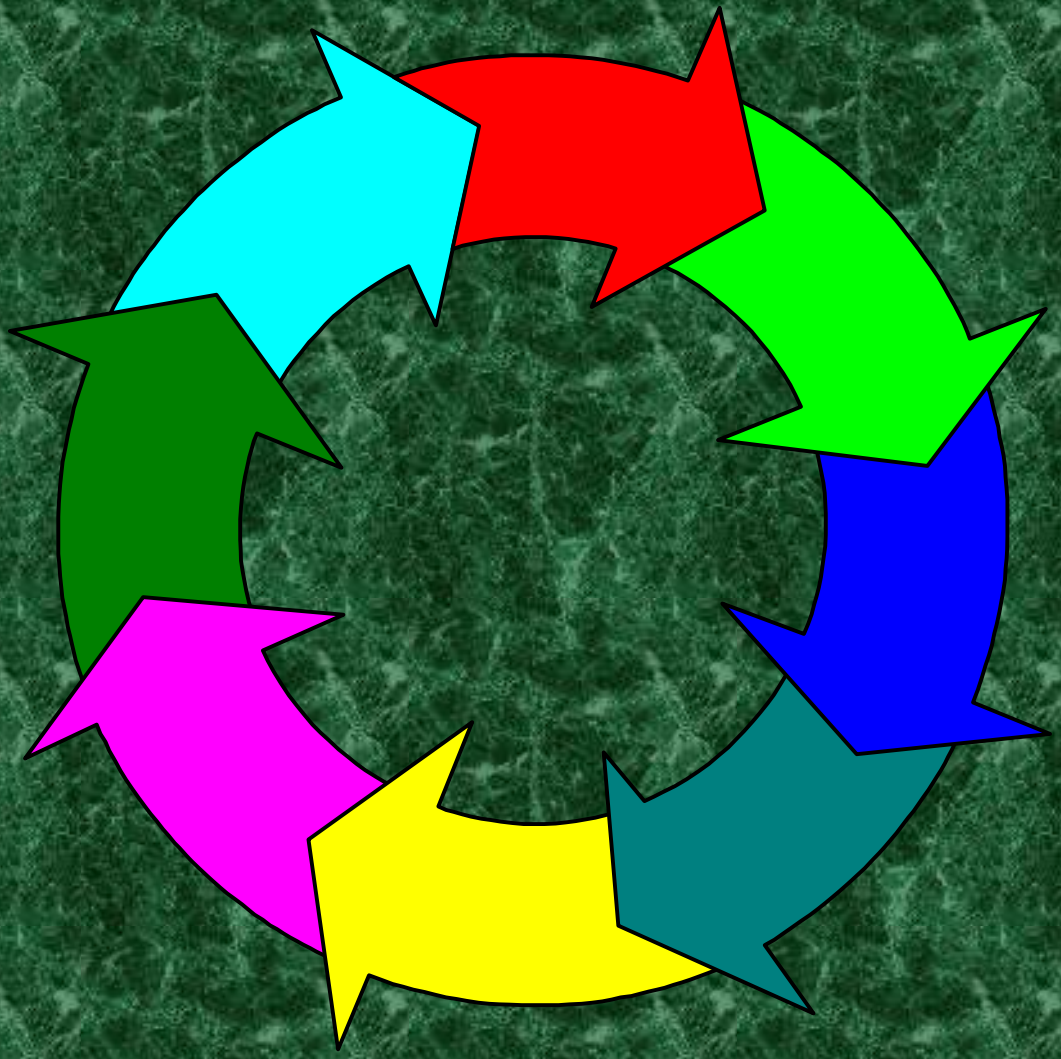
The possible combinations

- Hazard to Public?
- Reporting required by Permit?
- Reporting required by Law?
- Is there a legal basis for not releasing?
- Client wants to report
- Client doesn't want to report
- Client is totally confused

Reporting Requirements

- There is no “one size fits all answer” on whether or not to report
- The decision must be based on the facts and circumstances surrounding each case
- High risk judgment call!
  - Client sometimes faces criminal penalties for not reporting something that should have been reported
  - Organization exposes itself to civil penalties and enforcement action if it self-reports an incident that did not need to be reported

Ethics for Government Environmental Attorneys



The issue

Keeping Client Confidences

vs

Self-Reporting

E-Law Greed -- the game to play for CLE

The 0.1 credit-hour question

When does your client have a duty to self report?

(A) When there is a danger to public health

(B) When required by law (results of routine monitoring)

(C) When required by permit (your discharge exceeds the permitted maximum)

(D) All of the above

The 0.1 credit-hour question

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(B) When required by law (results of routine monitoring)

(C) When required by permit (your discharge exceeds the permitted maximum)

(D) All of the above

The 0.2 credit-hour question

What if self-reporting is not legally required, but your client wants to self report anyway?

(A) Help the client prepare the necessary report

(B) Ask the client to reconsider

(C) Get a second opinion

(D) All of the above

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The 0.4 credit-hour question

What if self-reporting is legally required, but your client refuses to self report ?

(A) Help the client cover up the incident

(B) Put an MFR in the file and forget about it

(C) Elevate the issue within the organization

(D) Make the report yourself

The 0.4 credit-hour question

What if self-reporting is legally required, but your client refuses to self report ?

(A) Help the client cover up the incident

(B) Put an MFR in the file and forget about it

(C) Elevate the issue within the organization

(D) Make the report yourself

The 0.6 credit-hour question

What if self-reporting is legally required, but your client refuses to self report, and orders you not to elevate the issue ?

(A) Help the client cover up the incident

(B) Put an MFR in the file and forget about it

(C) Elevate the issue anyway

(D) Make an anonymous call to the EPA hot line

The 0.6 credit-hour question

What if self-reporting is legally required, but your client refuses to self report, and orders you not to elevate the issue ?

(A) Help the client cover up the incident

(B) Put an MFR in the file and forget about it

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(D) Make an anonymous call to the EPA hot line

The 0.8 credit-hour question

What to do if EPA asks for an ECAMP report after receiving a "tip" on it's hot line?

(A) Tell them EPA agreed not to ask for it!

(B) Tell them the report is not releasable under FOIA

(C) Tell them the report is not releasable because it is privileged

(D) Tell them the report is privileged under your state's audit privilege statute

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(A) Tell them EPA agreed not to ask for it!

(B) Tell them the report is not releasable under FOIA

(C) Tell them the report is not releasable because it is privileged

(D) Release the report

The 1.0 credit-hour question

I should receive the full 1.0 hour ethics credit because:

(A) I endured your whole presentation

(B) I fell asleep less than 5 times

(C) I got at least one of the questions half right

(D) Ethics credit? What ethics credit?